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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JOSIAH S., a Person Coming Under the Juvenile Court Law.	B167876 (Los Angeles County Super. Ct. No. CK34375)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DIANA S., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret S. Henry, Judge. Affirmed.

Lisa M. Bassis, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, and Frank J. DaVanzo, Principal Deputy County Counsel, for Plaintiff and Respondent.

Diana S. appeals from a juvenile court order terminating her parental rights under Welfare and Institutions Code section 366.26[1] and providing adoption as the permanent plan for medically fragile minor Josiah S. We conclude that the juvenile court did not abuse its discretion in terminating parental rights, and affirm.

FACTS

This is the seventh time we revisit this troublesome case to address the merits of a juvenile dependency court order. We addressed the background and history of this lengthy matter through August 2001 in *In re Josiah S.* (2002) 102 Cal.App.4th 403, our fifth opinion we have issued.

Prior History:

Briefly, "Josiah S., born November 1997, was diagnosed as having a number of medical problems: scoliosis, a systolic heart murmur, an atrial septal defect, an inguinal hernia and probable gastroesophagal reflux. He suffered from several pulmonary problems, including chronic lung disease." (*In re Josiah S.*, *supra*, 102 Cal.App.4th at p. 406.) Josiah was released from the hospital to his mother, appellant Diana S., at age two months and five days.

On June 19, 1998, Josiah was admitted to Northridge Hospital for non-organic failure to thrive, dehydration and vomiting. As a result of this hospitalization, "DCFS filed a petition pursuant to section 300, subdivisions (b), (c), (e), (g) and (i). It was alleged that appellant failed to obtain critical medical treatment for her son, failed to schedule cardiology appointments, failed to cooperate with home nurse visits, and demonstrated many emotional problems limiting her ability to care for Josiah. On June 29, 1998, Josiah was ordered placed

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[1] All further statutory references are to the Welfare and Institutions Code.

in shelter care upon his release from the hospital. Appellant was to have monitored visits at least once a week and was allowed to contact the caretakers to inquire about Josiah's medical needs not more than once a week. Josiah was released to foster mother Grete V., a registered pediatric nurse." (*In re Josiah S.*, *supra*, 102 Cal.App.4th at p. 407.)

In our first opinion, No. B131637, we affirmed the jurisdictional and dispositional orders. We concluded that sufficient evidence supported the trial court's determination made pursuant to section 300, subdivision (e): "The record shows that when the nursing staff fed Josiah during his June 1998 hospitalization, he fed well. When his aunt and his foster mother fed him, he fed well too. In contrast, when appellant fed him, he frequently gagged and cried, and appellant told Dr. Olsen that Josiah seemed to vomit only when she was caring for him. Though appellant was instructed of Josiah's need for more calories in March 1998, she gave Dr. Olsen many excuses why she did not feed her son. According to the foster mother, appellant had Josiah for almost seven hours one day in July 1998, and fed him nothing, returning unused all the formula that the foster mother had given appellant to feed Josiah. The record contains substantial evidence supporting the jurisdictional finding under section 300, subdivision (e), that appellant willfully underfed Josiah for a prolonged time. The fact that Josiah gained weight while hospitalized and while living with his foster mother constitutes further evidence that appellant deliberately underfed Josiah for a prolonged time." (Unpublished Opinion No. B131637, p. 14.)

The second time the matter was before us was an appeal from an ex parte restraining order obtained against appellant and her parents. It restrained "appellant and her parents . . . from harassing or annoying the caretakers,

approaching within 500 yards of the foster parent's home, or making any written or telephone contact." (Unpublished Opinion No. B134678, p. 3.) We reversed the order because the application was supported only by "a 'conclusory, argumentative, handwritten letter, not signed under oath, and containing few evidentiary facts." (*In re Josiah S.*, *supra*, 102 Cal.App.4th at p. 408.)

The third appeal was from termination of family reunification services to appellant and an order of Josiah's permanent placement into long-term foster care at a confidential medical foster home in Riverside County. We concluded substantial evidence supported the trial court's determination. We first addressed the issue of whether Josiah's return to appellant would create a substantial risk of detriment: "The record reveals that appellant continued to engage in behavior harmful to her child. For example, it appeared that she continued not to provide him adequate nourishment during her visits, as indicated in the foster mother's April 1999 report that when Josiah was returned from three recent visits with his bottles still containing most of the formula inside. In addition, it was reported that during a visit, Josiah almost fell from a table because appellant was preoccupied with photographing him. This evidence supports the juvenile court's findings at the October 13, 1999 hearing that return of Josiah to appellant would create a substantial risk of detriment to him." (Unpublished opinion No. B136387, p. 16.)

We then turned to the issue of whether DCFS provided reasonable reunification services. "The history of this case shows that the court attempted to give DCFS latitude in fostering contact between mother and son. The court initially allowed appellant to have four-hour monitored visits on weekends if not in conflict with Josiah's medical appointments. It subsequently restricted visits to a DCFS office with DCFS-approved monitors other than appellant's parents, but did so only after the court was informed that appellant and her parents were harassing the foster family to the point that they jeopardized Josiah's medical placement with

the foster mother. Likewise, the juvenile court restricted appellant from attending medical appointments only after the court was informed that appellant was disruptive and hostile at these appointments. We conclude that there is sufficient evidence that the juvenile court provided reasonable reunification services. [¶] Appellant now requests that reunification services include transportation, yet she never requested transpiration before. She also seeks inclusion in all of Josiah's medical care. This request does not take into account that appellant was barred from participating in Josiah's medical care only after she threatened doctors, cancelled appointments with his treating physicians and made appointments with new physicians without the knowledge and consent of DCFS, the foster parents and the court. Further, appellant asks us to sanction the juvenile court 'for tolerating less than optimal care and follow-up of minor Josiah's medical and physical needs.' Like appellant's request for inclusion in Josiah's medical care, this request does not take into account the substantial evidence which supports the juvenile court's factual findings at the October 13, 1999 hearing. [¶] Since substantial evidence supports the juvenile court's factual finding that DCFS provided reasonable reunification services, the court did not err in terminating services pursuant to subdivision (e) of section 366.21." (Unpublished opinion No. B136387, pp. 17-18.)

Our fourth review of this matter was triggered by appellant's ejection from the courtroom during a review hearing scheduled to address: "(1) review of the permanent plan previously adopted; (2) extension of an order restraining appellant from interfering with the caretakers of Josiah; and (3) appellant's counsel's motion to be relieved as counsel for appellant." (Unpublished opinion No. B143060, p. 3.) We reversed the orders made by the trial court and remanded for further hearings. In our opinion we noted: "We understand and can sympathize with the trial court regarding the fact that appellant can be difficult at

times. But the record does not demonstrate that appellant's conduct at this hearing was improper. She merely wanted to address the court herself. This is especially significant in light of the fact that appellant's counsel had moved to be relieved and had not been able to have a meaningful conversation with appellant to understand appellant's position on each of the issues then before the court. Expelling appellant from the courtroom left her without any effective advocate in the courtroom." (Unpublished Opinion No. B143060, p. 8.)

The fifth time this matter appeared before us resulted in our published opinion which reversed "[t]he orders of May 25, 2001 and August 2, 2001, denying appellant a contested hearing under subdivision (e) of section 366.3, and May 31, 2001, summarily denying appellant's section 388 petition." (*In re Josiah S.*, *supra*, 102 Cal.App.4th at p. 420.)

The next matter before us was a petition for writ of mandate by appellant. She challenged the trial court's setting of a section 366.26 hearing after denial of appellant's section 388 petition. We denied the petition. (Unpublished Opinion No. B163705, p. 28.)

Appellant's section 388 petition raised two issues. First, she sought to set aside the jurisdictional order we addressed in the first appeal. It was appellant's position that the initial order sustaining jurisdiction was faulty because it attributed Josiah's continued failure to thrive to her care instead of to his significant medical problems with which he was born. While appellant's new evidence suggested that neither the court nor DCFS apparently appreciated the extent of Josiah's physical condition in the beginning, we concluded her showing did not overcome the evidence supporting the trial court's finding that appellant failed to provide adequate care for Josiah which resulted in the court's assertion of jurisdiction pursuant to section 300, subdivision (e). (Unpublished Opinion No. B163705, pp. 23-24.)

The remainder of appellant's section 388 petition addressed whether or not there was a change of circumstances in appellant's mental state to where she had improved sufficiently to care for Josiah. We explained the issue as follows: "At issue with regard to whether Diana can properly care for Josiah is the relatively new medical opinion, documented in September 2002, that Josiah needs a heart-lung transplant soon and that without the procedure, the boy is at high risk of dying in the near future. Also relatively new, since August 2002, is that a family with an approved home study and with experience with a medically fragile child has expressed interest in adopting Josiah." (Unpublished Opinion No. B163705, p. 25.) Evidence was presented by DCFS supporting transfer of Josiah to the new family in Northern California. Appellant presented evidence that she was addressing psychological problems which had previously affected her ability to properly care for her son, and she was making significant improvement to address her son's needs. She also presented evidence from medical doctors treating Josiah about his needs, and from Dr. Rochelle Feldman who stated that Josiah would be able to receive adequate treatment in Southern California, at least equal to that in Northern California, if not better. Dr. Feldman also opined as follows: '"Josiah has been wrongfully taken from his mother. I believe it is imperative this Court return Josiah to his mother'[s] care in the near future and provide her with increased visitation with her son now.' . . . 'Josiah would benefit medically and emotionally by having increased visitation with his mother [and that he] should be placed within reasonable distance from his mother's home. [¶] . . . I believe the Juvenile system has failed both Josiah and his mother and has contributed to Josiah's worsening medical condition. Josiah's foster placement fragmented his medical care and his caretaker never had a complete picture of his medical conditions and medical history. As a result Josiah has continued to fail to

thrive with chronic lung disease worsening his oxygenation and causing significant pulmonary hypertension which may be irreversible.'" (*Id.* at p. 8.)

We set forth here our reasons for affirming the trial court's denial of the contested portion of appellant's section 388 petition:

> "There is no question that Diana loves her son, and is attempting to have as much contact with him as legally possible. There is also evidence that she is attempting to control her impulses to control situations, and to defer to professionals. At her therapist's advice, she became involved in support groups for parents with special needs children, and she has restrained herself in court, as conceded by the DCFS social worker, Adams. Further, there is evidence that her visits with Josiah have gone well.
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> "But what is the best interest of a child in the dependency systems depends on the stage of the dependency proceedings. (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1788.) 'At a hearing on a motion for change of placement, the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child. [Citations.] [¶] After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point "the focus shifts to the needs of the child for permanency and stability" [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best

interests of the child.' (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

"Deferring to the juvenile court's fact findings on Diana's courtroom demeanor, we note that the court observed Diana continue to exhibit bizarre behavior. We also note that Diana continued to not follow directions. She had to be repeatedly told by the court and counsel to limit her answers to what was asked. At one point, the court sustained DCFS's objection to an answer as nonresponsive. Diana had to be told not to interrupt the court. Thus, sufficient evidence supported the juvenile court's finding that there has not been an improvement in Diana's behavior, at least in the courtroom.

"Diana's therapist, Dr. Goldring, testified that she saw Diana only twice in 2002, that she did not conduct testing to see if Diana improved since she was tested at the early stage of the dependency proceedings, and that the therapist did not observe Diana interact with her son. The court noted that notwithstanding Dr. Goldring's opinion that Diana made progress, Diana's refusal to accept responsibility for past action indicated that her medical state did not improve to the extent that she could care for her son.

"In light of the post-termination stage of the proceedings and the medical recommendation for the heart-lung transplant requiring a stable home, we conclude that the evidence in the record supported the trial court's conclusion that there was no change in circumstance with respect to Diana's mental state to warrant a change in foster placement." (Unpublished Opinion No. B163705, pp. 26-27.)

The last time this case was before us was after the trial court denied appellant's attempt to block Josiah's transfer to prospective adoptive parents in

Northern California. We affirmed the trial court's order. "Significantly, we concluded in our most recent opinion that sufficient evidence supported the juvenile court's prior factual finding that mother's behavior had not significantly improved so as to constitute a change of circumstance for section 388 purposes warranting a modification of the juvenile court's prior disposition order. Further, we considered the stage of the proceedings here, where family reunification services already have been terminated and the focus has shifted 'from reunification to the child's need for a stable and permanent home.' (*In re Casey D.* (1999) 70 Cal.App.4th 38, 48.) We also consider the opportunity of a prospective adoptive family willing and evidently able to care for Josiah. The evidence in the record is that Josiah remains a medically fragile child who may require a heart and lung transplant. It is unrefuted that the availability of a permanent and stable home with adults capable of caring for a transplant recipient is a preliminary factor in Josiah's eligibility for potential surgery. Under the circumstances here, the juvenile court did not abuse its discretion in not disturbing DCFS's decision to place Josiah in the pre-adoptive home in Northern California." (Unpublished Opinion No. B164383, p. 6.)

The Current Appeal:

The hearings at issue in the present case began with a section 366.26 selection and implementation hearing originally set for March 21, 2003. DCFS prepared a report for this hearing on Josiah's placement with the prospective adoptive family in Northern California, which occurred in December 2002. The family had another fragile child who had undergone a kidney transplant. The family reported that since Josiah's placement, his vocabulary had increased by about 20 words, so that he now had a vocabulary of about 25 words. The other child was thriving in the family's care and appeared to have bonded with Josiah. It

was reported that the prospective adoptive mother stays at home and is a registered nurse, the prospective adoptive father is a school psychologist, and the family has a strong support network of family and friends.

Since Josiah's placement in Northern California in December, appellant had her first visit with him on March 9, 2003, and this visit went well. Prior attempts for visitation were unsuccessful because appellant's monitor did not confirm that he could monitor December visits, the monitor was unavailable for the weekend scheduled in January, and appellant did not appear for a February visit because she reportedly did not receive from her attorney the details of the scheduled visit.

On March 21, 2003, the juvenile court continued the hearing to May 23 for a contested section 366.26 hearing.

Eddie Adams, the DCFS social worker (CSW), filed a report for the continued hearing. It was reported that the prospective adoptive family estimated that Josiah now spoke about 30 words. He noted that the consistency of appellant's visitation "has varied widely over the past five years. At times [appellant] would visit Josiah 3-4 times per month, and then there have been periods when she would not visit for several months. There have been several instances in which visits were scheduled and [appellant] did not show up, and did not call to inform either the CSW or the caregiver." After the March 9, 2003 visit, appellant visited her son on March 23, April 26, April 27 and May 11.

DCFS recommended that the juvenile court terminate appellant's parental rights.

CSW Adams, pediatrician Rochelle Feldman, appellant's monitor, Douglas B., and appellant testified at the May 23 hearing. Adams admitted that he had never observed Josiah and appellant interact together, and that over the past seven months he received numerous letters from appellant complaining that he was

not giving her regular scheduled visits. Appellant testified that most of the times that she requested visits, she experienced problems with CSW Adams, and that she went to the DCFS Regional Administrator for assistance.

Dr. Feldman testified that she has known appellant since Josiah was about 18 months old, but that she saw him only once after that, on May 11, 2003. When she observed appellant with her son on May 11, Dr. Feldman thought their interaction "was very positive." She explained, "I was very surprised, actually. Josiah, by this point has started talking, and he couldn't say his first m's, but he was referring to [appellant] as 'Ommy,' which is mommy. And . . . when I approached as a stranger who he didn't recognize, the first thing Josiah did was retreat up against to [appellant], which is typical for a child of almost any age, when they see a stranger approach, if they're . . . used to or they know the person they're with and bonded with -- basically, if they're with mom, they usually run into mom's skirts. That's exactly what Josiah did." Appellant showed affection toward her son, hugging and kissing him, and he reciprocated. When he was short of breath, appellant either offered him something to drink or asked him to "'give Mommy a kiss' or 'give Mommy a hug.' He'd come over, give her a hug, and she'd hold him for a few seconds so his heart rate could slow down and his breathing could normalize a bit."

Dr. Feldman disagreed with the recommendation to terminate parental rights for the following reasons: "First and foremost is the only one who knows Josiah's complete medical history at this point is [appellant]. And because he's so medically complex and because his medical problems are so life-threatening or potentially life-threatening to lose continuity of any kind would pose a great risk to Josiah. . . . And I think it's very important, especially in a child as medically fragile, that there be at least one person available for medical reasons to be able to give a coherent and continued history. . . . [¶] The second issue is an issue of

advocacy. . . . Up until now, the only single advocate that Josiah really has had has been [appellant]. Now, as I understand it, this placement has been the best he's ever had outside of his mother's home; and I cannot say, having never met the current foster-adoptive mother, that she wouldn't be as vigorous an advocate for him as [appellant] has. But . . . I have to say that his two prior placements were God-awful and caused probably irreparable harm to him. Until such time as we could ascertain that his current placement would keep him in a position of having somebody being a strong and very forceful advocate for him, I would have to say that it would be inappropriate and potentially harmful to Josiah to cut [appellant's] parental rights at that point in time. And since he's only been up there for not even, I think, about six months, I think that is way too soon to know whether or not that situation is going to continue. I think it's way too premature to cut her rights until we know whether or not he's going to have a strong enough advocate and somebody who knows the medical history adequately." She concluded: "it's pretty rare to see a five-and-a-half-year-old boy full of spunk actually respond to his mother's request to slow down -- not only slows down for a few minutes, but that's a lot better than a lot of kids I've seen who are this sick and this delayed."

On cross-examination, Dr. Feldman admitted that she had never treated Josiah.

Appellant's most current monitor, Douglas B., testified that he has known appellant for over two years and that he monitored about five trips to Sacramento in the last six months. Toward the beginning of the testimony, appellant apparently disrupted the examination. When the monitor was asked the last time he saw Josiah with appellant, appellant interrupted in an attempt to help him answer the question. The juvenile court instructed appellant, "You are not to be telling the witness what to testify to." Appellant replied, "I'm just reminding

him of the visits." The court reiterated, "You don't talk to the witness on the stand." Appellant then apologized and the examination resumed.

Douglas testified that Josiah called appellant "by something that approximates 'Mom.'" He commented, "I've never had a moment where I thought that there wasn't affection between the two. There is." Regarding Josiah's hospitalization two years earlier, Douglas testified that appellant sat by her son's bed "for every moment that was possible, and I was there for many of those hours. . . . She brings toys, and they would interact to whatever degree." Douglas added, "There was a lot of interaction between [appellant] and the doctors and the nurses to the degree that she would step away when the therapist would come in. There would be conversations with the physician about the health of the child. I did hear comment that the child's doctors had essentially given up until Mom got there and there was a reversal." He explained, "There was a reversal in the health of the child once we were allowed into the rooms. [¶] . . . [¶] And that was surprising to the physicians." Douglas noted that "at least one or two physicians did say the kid was responding to her presence and that there was reversal. The kid was alive. We got to the hospital long after the kid had been admitted and it was a bleak situation."

He also testified about appellant's behavior during the visits that he monitored in Northern California. Asked whether he had to cut visits short because of inappropriate behavior on appellant's part, Douglas replied, "Certainly not." He noted that Josiah wanted "to keep the visits going" and that it was difficult to end the two-hour visits. Douglas stated that appellant was "pretty good at getting [Josiah] to pick a color of socks and for getting him to put them on. He didn't want to put the shoes on. She's pretty good at distracting him. He's a kid that's got a will and it's difficult to reverse that will." Douglas described appellant as being "an integral part of the kid's life." He opined that Josiah would benefit

from the continuation of his relationship with his mother, noting how appellant's presence at the hospital two years earlier improved Josiah's medical condition.

Appellant testified that her visitations with Josiah for the last three months "went very well. The only part is I believe it's hard for him to be in different places, so it's an adjustment for him to have a visit at a location that is not the normal location where -- we used to have it in a park in Moreno Valley, but he adjusted." Appellant had a two-hour visit on March 9, 2003, in Rocklin, with her monitor and the prospective adoptive mother present. Appellant testified that Josiah was very happy to see her, that he had big smile, and that he did not want the visit to end. She "was overjoyed to see him. I hadn't seen him since the end of November." Appellant testified that he reciprocated the affection she gave him, and that he called her "Ommy." Appellant testified that on the May 11 visit, her monitor told her that Josiah was calling out for her when she went out of the monitor's car to telephone Dr. Feldman.

Appellant said she could give Josiah "[t]he love and devotion that only a mother that has had so many setbacks with her child's life and yet has been there, and has been even before he was born, knowing the birth defects that the doctors felt he would be born with, that I was there for him and he was . . . even more precious to me, because I knew he would be born with disabilities, with handicaps in areas in his life, and I have a gift of mercy. . . . I feel very much for people in need. That is at times why people would say I cry. It's because I feel. And your own flesh and blood is something that if you love your child as I do, dearly, you feel greatly for them, and you want to be there to help them and make sure they're okay and let them know how loved they are." She stated that her son "looked at me for an answer. He looked to me for comfort. He came to me when -- for example, we met initially at Carl's Junior, and Josiah would like to climb the equipment, and he had a little difficulty climbing. He looked to me to help him

climb, and then particularly when he came down he would say, 'Up. Up.' When he means up or down in a direction. He would say, 'Up,' when he wanted to go down and I'd help him down." Appellant testified that she monitored Josiah's condition during visits, checking his oxygen and increasing it when he was exercising. She expressed concern that if visitation were stopped and her parental rights terminated, Josiah "would feel that somebody had abandoned him."

On June 5, 2003, CSW Adams filed an "Information for Court Officer" requesting the juvenile court to refer to a June 3 letter from Josiah's treating physician, a May 28 letter from his prospective adoptive mother and a June 4 letter from Adams to appellant regarding visitation. The letter from Dr. Jeffrey Feinstein stated that Josiah's current caregiver asked for a medical opinion "as to whether it is safe . . . for Josiah to remain in his current home." Dr. Feinstein thought he provided Josiah the best medical care possible, admitting at the same time that he was "significantly biased." Dr. Feinstein wrote, "Please understand that this letter is, in no way, intended to comment on the suitability of one caregiver over another, simply to provide a medical opinion regarding this one issue."

In the prospective adoptive mother's May 28, 2003 letter, she wrote that Dr. Feldman saw and examined Josiah without her knowledge beforehand. The prospective adoptive mother wrote that when she brought Josiah to appellant on May 11, appellant "was very rushed that day to take him from me and was not amenable to receiving any information at that time. . . . I tried to review with [appellant] how to clear a mucous plug, should one occur. She was in a hurry to leave and did not listen. . . . It is also important to note that I had to remind [appellant] three times to fasten Josiah into his car seat. I finally said 'Don't worry Josiah, Uncle Doug [the monitor] won't start the car until you are fastened in.' The monitor then fastened Josiah into the car seat. [¶] . . . [¶] When Josiah was

returned to me at the end of the visit [appellant] noted that he had been walking constantly up until time to leave the park and that he had thrown a tantrum when made to leave. However, he was not in any respiratory distress at that time. . . . I cannot help but be concerned that [appellant] deprived Josiah of oxygen . . . in order to cause the amount of respiratory difficulty that was described by Dr. Feldman. In the five months that Josiah has been with us 24/7 I have never seen any indication of severe respiratory distress and certainly no signs of any airway obstruction." The prospective adoptive parent wrote that on Josiah's first visit with appellant after he was placed with the Northern California family, appellant removed Josiah's brace to change his diaper. When she put the brace back on, she did such a poor job that Josiah "was severely bruised and unable to wear the brace for three days. Since that time I remove the brace prior to placing Josiah in her care and replace it when he comes back to me." The prospective adoptive parent concluded: "Josiah has become very bonded to us in the relatively short time that he has been in our family. We love him dearly and are wholly committed to providing him a safe, healthy, loving permanent home. We are working closely with his physicians to insure [*sic*] that all of his needs are met."

In the June 4 letter written by Adams to appellant, he stated that the monitor's "acquiescence in regard to Dr. Feldman's 'examination' of Josiah on 5/11/03 was both unacceptable and entirely inappropriate."

After hearing the evidence and argument, the juvenile court found Josiah to be adoptable and that the exception set forth in subdivision (c)(1)(A) did not apply. It did not think that Josiah would benefit from continuing the relationship with appellant. It found that her visits were irregular over the years, "and from the file it does not appear that it's the social worker's fault that they had been irregular." The court discounted Dr. Feldman's opinion, finding that she "comes in here clearly as an advocate for mother. . . . Dr. Feldman seems like a

very nice and very competent doctor, but I really was shocked at the lengths that she went to with her declaration and her testimony, that just so much of it was speculative. She made the argument that mother is an effective advocate for the child; but the history of the case is that mother is not an effective advocate, but rather seems to just for the most part irritate the medical professionals . . . this originally came in because there was in part an obstruction, specifically, . . . she took Josiah to the hospital and wouldn't let him be treated until the medical bill got straightened out. The case did originally come in with a public health nurse visiting Josiah and visiting mother all the time, and it was the public health nurse that said mother was not being cooperative and turned it over to the Department of Children and Family Services. And you know, this case really from the beginning has been about mother's behavior. . . . I know that mother appears to love Josiah desperately, but that by itself is not enough. He's got an adoptive family who has been through a transplant before . . . and the stability that that placement is offering him, I think, is going to be his best chance for survival."

The court terminated appellant's parental rights, and ordered adoption as the permanent plan.[2]

DISCUSSION

We review the juvenile court's order terminating appellant's parental rights for abuse of discretion (*In re Jasmine D*. (2000) 78 Cal.App.4th 1339, 1351), and uphold the court's findings if supported by substantial evidence.

Prior to the termination of parental rights, the court must conduct a hearing, the result of which is designed "to provide stable, permanent homes for

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[2] The court stayed the termination order until August 21, 2003, at which point it lifted the stay.

these children." (§ 366.26, subd. (b).) Subdivision (b) requires that the court review the evidence and then "make findings and orders in the following order of preference: [¶] (1) Terminate the rights of the parent or parents and order that the child be placed for adoption. . . . [¶] (2) On making a finding under paragraph (3) of subdivision (c), identify adoption as the permanent placement goal. . . . [¶] (3) Appoint a legal guardian for the child. . . . [¶] (4) Order that the child be placed in long-term foster care. . . . [¶] In choosing among the above alternatives the court shall proceed pursuant to subdivision (c)." Subdivision (c) provides that if the court determines "by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption."

Subdivision (c)(1) of section 366.26 lists four exceptions to termination of parental rights. Appellant claims the exception set forth in subdivision (c)(1)(A) applies. That exception is where the parent "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).)

"In the context of the dependency scheme prescribed by the Legislature, we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. [¶] Interaction between natural parent and child will always

confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*In re Autumn H*. (1994) 27 Cal.App.4th 567, 575.) Moreover, the exception "must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Id*. at p. 576.)

Autumn H. does not "mandate day-to-day contact. Rather, the decision attempts to describe the nature of the beneficial parent-child exception to the general rule that adoption should be ordered when the child is likely to be adopted. Another way of stating the beneficial parent-child concept described in *Autumn H.* is: a relationship characteristically arising from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship. A strong and beneficial parent-child relationship might exist such that termination of parental rights would be detrimental to the child, particularly in the case of an older child, despite a lack of day-to-day contact and interaction." (*In re Casey D., supra*, 70 Cal.App.4th at p. 51.)

Appellant argues that examining the evidence in the light most favorable to the judgment, she met her burden of proving a beneficial relationship. She maintains that her visitation should be regarded as regular in light of the

"incessant tug of war" between CSW Adams and appellant over the time, place and manner of visitation. In support of her argument, she cites *In re Brandon C.* (1999) 71 Cal.App.4th 1530, which upheld a juvenile court's finding that the parental relationship exception in subdivision (c)(1)(A) of section 366.26 applied. (*Id.* at p. 1534.) "The benefit of continued contact between mother and children must be considered in the context of the very limited visitation mother was permitted to have." (*Id.* at pp. 1537-1538.)

Appellant also relies on *In re Amber M.* (2002) 103 Cal.App.4th 681 and *In re Jerome D.* (2000) 84 Cal.App.4th 1200 for support that the exception in subdivision (c)(1)(A) of section 366.26 applies.

In *Amber M.*, dependency petitions were filed on behalf of two girls and a boy because their substance-abusing mother left the younger daughter alone in a bath when she was seven months old. The girls were placed with their grandmother, and the boy was placed with his grandfather. Both grandparents expressed the wish to adopt. Mother filed a section 388 petition more than two years after her children were out of her care, other than a 60-day trial visit with her son when he was a toddler. At the time of the section 388 hearing, mother was living in a drug rehabilitation home that would not accommodate children, and the waiting time for a home that would accommodate the children was up to 90 days. (103 Cal.App.4th at pp. 684-687.)

"Examining the evidence in the light most favorable to the judgment, we conclude that not only did Mother maintain regular visitation and contact, but she also met her burden of showing a beneficial relationship. [Citations.]" (*In re Amber M., supra*, 103 Cal.App.4th at p. 689.) It was noted that the oldest daughter spent about five of her seven years with her mother, the son had spent more than half of his nearly five years of his life with his mother, and the youngest daughter spent most of her three years of life away from her mother. The two oldest

children loved and missed their mother, called her "mom" and were found to be strongly attached to her. Even the youngest daughter was found to be strongly attached to her mother. (*Id.* at pp. 689-690.) "Mother visited as often as she was allowed and acted in a loving, parental role with the children when permitted visitation. She was devoted to them and did virtually all that was asked of her to regain custody. The social worker, the only dissenting voice among the experts, provided no more than a perfunctory evaluation of Mother's relationship to the children, instead focusing on her current inability to provide a home for them and on the suitability of the current placements, perhaps swayed by both grandparents' qualifications and willingness to adopt and their refusal to consider guardianship or any other permanent plan. Admittedly, at the time of the section 366.26 hearing, Mother was not ready for the children's return to her custody. Neither that fact, however, nor the suitability of the grandparents' homes can justify the termination of parental rights. If the proposed adoptions proceed, the three children will be adopted in two separate groups, and the maintenance of mother-child and sibling relationships will depend solely on both grandparents' continued goodwill." (*In re Amber M.*, *supra*, 103 Cal.App.4th at pp. 690-691.)

In *Jerome D.*, a six-year-old boy became the subject of a dependency petition after he received a large burn in the shape of an iron on his behind. His two younger half-siblings' father, who was an ex-boyfriend of mother, reported to police that mother intentionally burned the boy, and she was later convicted of child abuse. (84 Cal.App.4th at p. 1203.) The half-siblings' father, with whom the boy was placed, applied to adopt him. (*Id.* at pp. 1203, 1205.) But the boy had a close parental relationship with his mother, and she maintained regular visitation. (*Id.* at pp. 1205-1206.) The boy's counsel's investigator testified that when she visited him in his half-siblings' home, he seemed lonely, sad and "the odd child out." The boy said he spent little time with his half-siblings' father, and he smiled

when he said he wanted to live with his mother. The investigator and the legal intern of the boy's attorney both testified that at mother's home, the boy looked happy. (*Id.* at pp. 1206-1207.)

"Examining the evidence in the light most favorable to the judgment, we conclude there is insufficient evidence to support the determination that Mother did not meet her burden of showing a beneficial relationship. [Citations.] At the time of the section 366.26 hearing, Jerome was nearly nine years old. He had lived with Mother for the first six and one-half years of his life and expressed his wish to live with her again. For at least two months, he had been having unsupervised overnight visits in her home. He called her 'mom' or 'mommy.' There was apparently no woman in his life other than Mother with whom he had a beneficial relationship." (*In re Jerome D.*, *supra*, 84 Cal.App.4th at p. 1207.)

Unlike Josiah in the present case, the two older children in *Amber M.* and the boy in *Jerome D.* had lived most of their lives with their mother and had established parental relationships with their mothers. Josiah resided with appellant for only three months following his initial release from the hospital when he was just a little over two months old. From his detention until the present Josiah has been in the custody of foster parents and all of appellant's visitation with Josiah has been monitored, a result of appellant's inability early on to appropriately interact with the foster parents and medical workers. There is no significant evidence that a parental relationship as contemplated within subdivision (c)(1)(A) of section 366.26 has been established.

As we noted in our unpublished opinion filed March 12, 2003, and numbered B163705, "There is no question that Diana loves her son, and is attempting to have as much contact with him as legally possible. There is also evidence that she is attempting to control her impulses to control situations, and to defer to professionals. . . . Further, there is evidence that her visits with Josiah

have gone well. [¶] But what is the best interest of a child in the dependency systems depends on the stage of the dependency proceedings. (*In re Elizabeth R.* [*supra*] 35 Cal.App.4th [at p.] 1788.)" As we noted, after the termination of reunification services, the focus shifts from the parents to the child. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

While we sympathize with appellant's plight, we cannot conclude the juvenile court abused its discretion in terminating appellant's parental rights.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.